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APPELLANT'S BRIEF.

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WM. R. STANS

Supreme Court of the United States

OCTOBER TERM, 1925.

No. 46.

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1925.

No. 111.

ATLAS LINE STEAMSHIP COMPANY, *Appellant*,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FOREWORD.

The Atlas Line Steamship Company, the appellant, was incorporated under the laws of the State of New Jersey on June 23, 1903 (R. 1 and 4-9). It became a subsidiary of the Hamburg-American Line, a German corporation, in that all of the issued and outstanding capital stock of the Atlas Line Steamship Company was beneficially held for said German corporation from June, 1903, to December, 1917, when said stock was seized and taken over by the Alien Property Custodian as enemy-owned (R. 1). The Alien Property Custodian exercised the rights of stock ownership and elected a Board of Directors for Atlas Line Steamship Company to manage and control its affairs (R. 1). The Alien Property Custodian seized no money nor other property belonging to the Atlas Line Steamship Company, as such money or other property was recognized as belong-

ing to the Corporation and not to its stockholders. Through the Board of Directors, elected by the vote of said Alien Property Custodian, property of the Corporation was sold, including premises at 45 Broadway, New York City, which brought $2,000,000, and the proceeds of said sales are held in the treasury of the Corporation. Said Board of Directors, charged with the duty of administering the affairs of the Corporation, caused the original petition in this case to be filed in the Court of Claims of the United States on April 5, 1923 (R. 1), so as to bring the claim of appellant against the United States, for its property requisitioned by the United States from appellant, within the six year period allowed for filing claims in said Court under the provisions of Section 156 of the Judicial Code.

OPINION DELIVERED IN THE COURT OF CLAIMS.

The Court of Claims of the United States, the court below, issued a short Memorandum upon passing judgment in this case, sustaining the demurrer to the petition of claimant below, holding that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case, and, for its reasons in so deciding, making reference to Ribas y Hijo, 194 U. S. 315; Herrera Case, 222 U. S. 558, and to the Court's Opinion in Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924. Neither said Memorandum nor said Opinion have been officially reported, but both appear in the printed Record (R. 16-23).

GROUNDS ON WHICH JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED.

From the judgment rendered on the 17th day of March, 1924, by the Court of Claims, adverse to claimant below (R. 16), claimant below derives its right to an appeal to the Supreme Court of the United States, pursuant to the provisions of Sections 242 and 243 of the Judicial Code.

Claimant below upon the claim set up in its petition to the Court of Claims prayed for a judgment in its favor against the United States in the sum of $3,790,335.00, with interest (R. 3), and the judgment entered in said Court and appealed from sustained a demurrer and dismissed said petition (R. 16).

On June 4, 1924, claimant below made application for, and gave notice of, an appeal to the Supreme Court of the United States, from the judgment of the Court of Claims sustaining defendant's demurrer and dismissing claimant's petition on the grounds that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case; and, on June 16, 1924, the Court of Claims allowed the appeal (R. 23).

Claimant below in its said petition alleged that it is a corporation, created by and existing under the laws of the State of New Jersey, organized on June 23, 1903 (R. 1), that on April 2, 1917, it purchased from the Hamburg-American Line for a consideration of $2,250,000.00 five steamships, named "Nassovia," "Armenia," "Arcadia," "Savoia" and "Saxonia," valued at $450,000.00, $475,000.00, $450,000.00, $325,000.00 and $550,000.00 respectively (R. 1-2), and acquired title to said steamships by and through a Bill of Sale (R. 2; R. 9-13), and was the owner of all of said steamships at the time or times when the possession and title thereto were taken over to the United States, as hereinafter mentioned (R. 2), that on April 6, 1917, all of said steamships were taken into the custody of the United States of America by the Treasury Department, through customs officials, the "Nassovia" and "Armenia" at the Port of New York, the "Arcadia" at the port of Norfolk, the "Savoia" in the waters of the Canal Zone and the "Saxonia" in the port at Seattle, all of said steamships then being German-registered vessels (R. 2), that the vessel "Saxonia" is included in an Executive Order made May 22, 1917 (R. 2; R. 13), and the vessels "Nassovia," "Armenia," "Arcadia" and "Savoia" are included in an Executive Order made June 30,

1917 (R. 2; R. 14-15), and pursuant to said Executive Orders and the authority given in the Joint Resolution (Public Resolution No. 2, 65th Congress), approved May 12, 1917 (40 Stat. 75), the possession and title of said steamships were taken over to the United States (R. 2), that said Joint Resolution prescribed certain uses to which said vessels so taken may be put and contemplates the presentation of claims for compensation, and claimant reading into said Joint Resolution the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founded its claim for which suit was brought upon said provision of the Constitution, said Joint Resolution and/or an implied contract with the Government of the United States, arising out of the facts stated and warranting the inference of an agreement on the part of said Government to pay to claimant a reasonable price for the property taken and to compensate claimant further for the time it was deprived of the use of its property (R. 2), that no compensation has been awarded or paid to claimant by the Government on this claim and that no suit has been brought on this claim in any Court other than the Court of Claims (R. 2-3), that claimant is the sole owner of the claim and is a citizen of the United States, to which it has at all times borne true allegiance, without in any way voluntarily aiding, abetting or giving encouragement to rebellion against said Government (R. 3).

Upon the claim so presented, the Court of Claims entered its judgment, sustaining the demurrer to the petition and dismissing said petition, said Court holding that the action sounds in tort and that it is without jurisdiction to hear and determine the case (R. 16). From the judgment of the Court of Claims, entered March 17, 1924, an appeal to the Supreme Court of the United States was allowed on June 16, 1924 (R. 23), and the appellant asks that said judgment be reversed so that its case may be heard upon its merits and the claimant below be awarded proper compensation.

CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

The present case comes before the Supreme Court of the United States on an appeal from a judgment of the Court of Claims (R. 12), entered March 17th, 1924, sustaining a demurrer to claimant's petition and dismissing the said petition on the grounds that the action sounds in tort and that the Court of Claims is without jurisdiction to hear and determine the case set up in said petition.

The case set up in said petition shows that the Government, without condemnation proceedings, appropriated private property of an American corporation for certain public uses under legislative authority. By the Executive Orders made a part of said petition by way of exhibits, it appears that the property was physically taken by the official duly authorized by Congress so to do, or by his duly constituted delegates.

Under the provisions of Sections 242 and 243 of the Judicial Code, an appeal to the Supreme Court shall be allowed, under such regulations as the Supreme Court may direct, on behalf of the plaintiff in any case where the amount in controversy exceeds $3,000.00, provided the appeal from the Court of claims is taken within ninety days after the judgment is rendered.

The Supreme Court has assumed jurisdiction to hear and determine such appeals in cases involving points of fact and of law quite analogous to those presented by the present case.

In United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935, Mr. Justice Brandeis, delivering the opinion of the Supreme Court, among other things, said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor.

United States v. Great Falls Manufacturing Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; United States v. Lynah, 188 U. S. 445, 462, 465, 23 Sup. Ct. 349, 47 L. Ed. 539; United States v. Kelly, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746; United States v. Cress, 243 U. S. 316, 329, 37 Sup. Ct. 380, 61 L. Ed. 746.

* * * * * * *

In order that the government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."

In A. W. Duckett & Co., Inc., v. United States, 45 S. Ct. 38, which was carried to the Supreme Court by an appeal from a judgment in the Court of Claims dismissing the case for want of jurisdiction, on the ground that the circumstances of the case did not justify the implication of a contract on the part of the United States to pay the plaintiff for the use of its property appropriated by the United States, Mr. Justice Holmes, among other things, said:

"The Court of Claims dismissed the petition for want of jurisdiction, upon the ground that the facts found excluded, as matter of law, the possibility that a contract should be implied and that therefore there could be no claim.

* * * * * * *

"Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims. United States v. North American Transportation & Trading Co., 253 U. S. 330, 40 S. Ct. 518, 64 L. Ed. 935."

As the Supreme Court has the sole right to pass upon the question of its own jurisdiction to entertain appeals invoking such jurisdiction, and it assumed jurisdiction to hear and determine the appeals brought by North American Transportation & Trading Co., and by A. W. Duckett & Co., Inc., the appellant in the present case, presenting in its

appeal points of fact and of law quite analogous to those in the cases so heard and determined, believes the said cases sustain the jurisdiction of the Supreme Court to hear and determine appellant's case.

STATEMENT OF CASE.

Suit was instituted in the Court of Claims of the United States on April 5, 1923 (R. 1), by appellant, claimant below, filing in said Court a petition alleging, among other things, the following pertinent facts:

1. That Atlas Line Steamship Company, the claimant, is a corporation created by and existing under the laws of the State of New Jersey, organized on the 23rd day of June, A. D. 1903 (R. 1).

2. That on April 2, 1917, said claimant purchased for $2,250,000.00 and became the owner of five steamships, named "Nassovia," "Armenia," "Arcadia," "Savoia," and "Saxonia," which it continued to own until they were taken from claimant by the United States for its use (R. 1-2), the transfer of title to claimant having been effectuated for said consideration by means of a Bill of Sale signed, sealed and delivered by the Hamburg-Amerikanische Packetfahrt Aktien Gesellschaft (Hamburg-American Line) to claimant on April 2, 1917 (R. 2; R. 9-13).

3. That on the sixth day of April, A. D. 1917, all of said steamships were taken into custody of the United States of America by the Treasury Department through customs officials, the "Nassovia" and "Armenia" at the Port of New York, State of New York; the "Arcadia" in the port at Norfolk, State of Virginia; the "Savoia" in the waters of the Canal Zone, and the "Saxonia" in the port at Seattle, State of Washington, all of said steamships then being German-registered vessels (R. 2).

4. That the vessel "Saxonia" is included in an Executive Order made on the twenty-second day of May, 1917 (R. 13) and the vessels "Nassovia," "Armenia," "Arcadia," and "Savoia" are included in an Executive Order made on the

thirtieth day of June, 1917 (R. 14-15), and pursuant to said Executive Orders and the authority given in the Joint Resolution (Public Resolution No. 2, 65th Congress), approved May 12, 1917 (40 Stat. 75), the possession and title of the aforementioned vessels were taken over to the United States, that said Joint Resolution, approved May 12, 1917, which authorized the President to take over to the United States the possession and title of said vessels, prescribes certain uses to which said vessels so taken may be put and contemplates the presentation of claims for compensation (R. 2).

5. That claimant, as the sole owner of the claim set forth in said petition, and not having assigned or transferred said claim or any part thereof or interest therein, and having at all times borne true allegiance to the Government of the United States, reading into the authority under which its property was so taken, the words of the Fifth Amendment to the Constitution of the United States—"nor shall private property be taken for public use, without just compensation"—founds its claim, for which said suit was brought, upon said provision of the Constitution of the United States, said Joint Resolution, and/or an implied contract with the Government of the United States, arising out of the facts and warranting the inference of an agreement on the part of the said Government of the United States to pay to claimant a reasonable price for the property taken as aforesaid and to compensate claimant further for the time claimant has been deprived of the use of its property, or for the time of the withholding of said price from claimant since the claim first accrued, no compensation having at any time been awarded or paid to claimant by the Government of the United States on said claim (R. 2-3).

6. That claimant brought no suit on this claim, other than the said suit in the Court of Claims, against the Government of the United States or anyone acting for it (R. 3).

On May 26, 1923, the defendant filed a demurrer to said petition (R. 16), the demurrer being worded, as follows:

"Defendant demurs to the petition in the above entitled case for the reason that it does not state a cause of action against the United States." (R. 16.)

On March 17, 1924, the Court of Claims entered an order, as follows:

"This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof, the court being of opinion that the demurrer is well taken, it is adjudged and ordered this 17th day of March, 1924, that the said demurrer be and it is hereby sustained, and the petition is dismissed" (R. 16.)

SPECIFICATION OF ERRORS.

1. The Court of Claims committed error in sustaining defendant's demurrer to claimant's petition and dismissing said petition.

2. The Court of Claims committed error in holding that claimant's action sounds in tort.

3. The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

4. The Court of Claims committed error in applying to its decision of claimant's case the reasons upon which it decided the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924.

ARGUMENT.

I.

The Court of Claims committed error in sustaining defendant's demurrer to claimant's petition and dismissing said petition. Said demurrer, filed May 26, 1923, reads as follows:

"Defendant demurs to the petition in the above-entitled case for the reason that it does not state a cause of action against the United States." (R. 16.)

This demurrer in form and substance is a general demurrer, raising but a single issue, to wit: Assuming the facts alleged in the petition to be true, do they state a cause of action by claimant against the United States?

With respect to the effect of a demurrer, it is first a rule that *a demurrer admits all such matters of fact as are sufficiently pleaded.* A demurrer is, consequently, an admission that the facts alleged are true; and, therefore, the only question for the Court is whether, assuming such facts to be true, they sustain the case of the party by whom they are alleged (Stephen on Pleading, 143). The facts alleged in claimant's petition show that the United States under due authority of law took for its use, by means of two separate acts of taking, valuable property of claimant, without giving any compensation for the property taken, thus leaving claimant to seek just compensation for the property so taken under such provisions of law as the United States has provided in such cases. The first of said separate takings gave the United States temporary police control over and possession of claimant's property upon the arising of a national emergency, a declaration of war. The second of said takings under the Joint Resolution of May 12, 1917 (40 Stat. 75), vested the title, as well as the possession, of said steamships in the United States. It is submitted that at least the second of these takings, which, under proper legislative authority and without fault of the claimant or assertion of adverse title by the Government, deprived claimant of its title to said steamships, created an obligation on the part of the Government to make just compensation to claimant for the title taken, said obligation arising under the provisions of the Fifth Amendment to the Constitution of the United States, and this obligation it has been held in a long line of cases, including the following:

U. S. v. Russell, 13 Wall. 623.
U. S. v. Great Falls Mfg. Co., 112 U. S. 645.
U. S. v. Lynah, 23 S. Ct. 349.
DeCamara v. Brooke, 135 Fed. 384.

U. S. v. Buffalo Pitts Co., 234 U. S. 228; 34 S. Ct. 840.
U. S. v. North American Transportation & Trading Co., 253 U. S. 330; 40 S. Ct. 518.
A. W. Duckett & Co., Inc., v. U. S., 45 S. Ct. 38

is sufficient to support an implied promise on behalf of the Government to pay just compensation for the property taken. Such implied promise brings appellant's case within the class of claims founded upon implied contracts, which the Court of Claims derived jurisdiction to hear and determine under the Act of Congress (10 Stat. 612), approved February 24, 1855, providing for the organization of the Court of Claims, and such jurisdiction has at no time subsequently been taken away from said Court.

The takings of appellant's said property for governmental use, as alleged in the petition, are, with respect to their effects, two classes of takings: one that deprived appellant of the use and occupation of its property, and the other that deprived it of the title to its said property. It nowhere appears in the record that the Government was without due authority to deprive appellant of either the use and occupation of said property or the title to said property, to meet and supply a governmental need or emergency, it nowhere appears in said record that the Government in either of said takings asserted an adverse claim to said property, against the property rights and title of appellant, but it does appear that appellant, a citizen or subject of the United States, was deprived by the Government of both the use and occupation of appellant's said property and of appellant's title thereto, and it appears further in said record that the taking of claimant's title to said property by the Government was pursuant to the authority given in the Joint Resolution (Public Resolution—No. 2—65th Congress), approved May 12, 1917 (40 Stat. 75), and it appears also in said petition that said property, when taken, had a commercial value estimated at $3,790,335.00 and that no compensation has at any time been awarded or paid to appellant by the Government for the property so taken. It is sub-

mitted, therefore, that if the taking of either such use and occupation or the title to said property constituted a taking sufficient to warrant the Court of Claims in finding the elements of contractual liability present, the demurrer to the petition should not have been sustained with respect to any taking that created an obligation on the part of the Government to make compensation; for by the facts alleged in the petition, in setting up two separate acts or kinds of taking, one pursuant to the police powers of the United States and the other pursuant to the provisions of the Joint Resolution of May 12, 1917 (40 Stat. 75), said petition presented two statements of facts in the nature of two separate counts, and if one of said counts only is defective, the Court should have given judgment for the claimant upon the good count.

If a demurrer be too large, that is, if it be pointed to all the counts of the statement of the case, where one of them only is defective, the Court will give judgment upon demurrer for the plaintiff, notwithstanding the defective count—Stephen on Pleading, 145.

The rules of the Court of Claims require that a petition must set forth "A plain, concise statement of the facts, giving venue and date, free from argumentative, irrelative and impertinent matter"—Rules of the Court of Claims, Rule 15 (2)—and rules of good pleading hold that it is not necessary to state such circumstances as merely tend to prove the truth of the fact, and that less particularity is required in alleging facts when they lie more in the knowledge of the opposite party than they do in the knowledge of the party pleading—Stephen on Pleading, 342, 370.

It is submitted that the facts stated in claimant's petition set up a cause of action against the United States, said cause of action resting upon an obligation having the elements of contractual liability, and that the Court of Claims committed error in sustaining defendant's demurrer to claimant's petition and dismissing said petition.

II.

The Court of Claims committed error in holding that the claimant's action sounds in tort.

The jurisdiction of the Court of Claims is limited by Section 145 of the Judicial Code so as not to apply to cases sounding in tort. This limitation is founded upon a sound public policy. Commenting on said policy, the Supreme Court by Mr. Justice Brewer, in Schillinger v. United States, 155 U. S. 163, 15 S. Ct. 85, said:

> "Under neither of these statutes had or has the court of claims any jurisdiction of claims against the government for mere torts. Some element of contractual liability must lie at the foundation of every action. In Gibbons v. U. S. Wall. 269, 275, it was said: 'The language of the statutes which confer jurisdiction upon the court of claims excludes by the strongest implication demands against the government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties,' And again, in Morgan v. U. S., 14 Wall. 531, 534: 'Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government.' "

It is clear, therefore, that this policy imposed by necessity is aimed at the protection of the Government from liability *for unauthorized wrongs inflicted by their officers on the citizens.* This public policy as thus clearly formulated, can not be made to cover seizures of property expressly authorized by Act of Congress, when the officers making the seizures were acting entirely within their proper legislative authority. No question is raised in the instant case as to the authority of any officer or agent of the United States in the matter of the seizures of the appellant's vessels. In

this case, the appellant, a national of the United States, doing business within the United States, has been divested of its property by reason of the inclusion of that property within the letter of the Joint Resolution of May 12, 1917 (40 Stat. 75). There is no question as to the President's Order being entirely within the authority of said Joint Resolution, nor is there any question as to the authority of any subordinate officers or agents of the Government in carrying out the President's Order.

It is contended, therefore, that the appellant's case is not an action sounding in tort within the meaning of said jurisdictional limitation, since no question of unauthorized action arises.

Furthermore, it is submitted that the cases cited by the Court of Claims in its Memorandum Opinion (R. 16) are clearly distinguishable from the instant case. Both these cases (*Ribas y Hijo* case, 194 U. S. 315, and *Herrera* case, 222 U. S. 558) are Spanish-War-seizure cases and only incidentally involve the jurisdiction of the Court of Claims under the Tucker Act.

The *Ribas y Hijo* case (194 U. S. 315) was an action brought by a Spanish corporation to recover from the United States the value of the use of a merchant vessel seized by the United States military forces in Ponce, Porto Rico, at the time of the capture of that place by American military forces.

The *Ribas y Hijo* case differs from the appellant's case in three important respects:

(1) In the Hijo case, the claimant was a Spanish corporation resident in the actual theater of war, and, therefore, clothed with enemy nationality and subject to the disabilities of that status. In the instant case, the claimant is a corporation of the State of New Jersey, and, therefore, clothed with American nationality and entitled to enjoy all its constitutional rights, including all safeguards to its property.

(2) In the Hijo case, the action was brought against the United States to recover the value of the use of a vessel during the time the vessel was held by the military forces of the United States. In the instant case, the action was brought against the United States to recover the value of the appellant's right, title and interest in its vessels which were completely appropriated by the United States under the authority of the Joint Resolution of May 12, 1917 (40 Stat. 75).

(3) In the Hijo case, the seizure was effected by military forces of the United States in Ponce, Porto Rico, at the time of its capture by American military forces, when this port was in the actual theater of military operations. In the instant case, the seizure was effected by the civil forces of the United States under due authorization by Congress, and in ports of the United States three thousand miles or more away from the scenes of actual military operations. In the Hijo case, the seizure was clearly a military seizure, carried out under the general discretionary authority vested in military officers. If those officers in the exercise of that authority made any mistake in judgment as to the seizure, the resulting wrong to the owner of the vessel was then unauthorized and within the jurisdictional limitations referred to above. There was in the Hijo case no special authorization directing the seizure of the vessel nor any participation in the seizure by civil authorities.

Furthermore, it clearly appears from the decision of the Supreme Court that the tort ground was a secondary and incidental ground of decision in the Hijo case. The primary ground of decision was the mutual relinquishment of claims by Spain and the United States under treaty provisions. This appears in the Opinion of the Court, as follows:

> "We may add that even if the Act of March, 1887, standing alone, could be construed as authorizing a suit of this kind, the plaintiff must fail; for, it is well settled that in case of a conflict between an act of Congress and a treaty,—each being equally the supreme law of the land,—the one last in date must prevail in the courts."

In the Herrera case (222 U. S. 558) there are also grounds of distinction from the instant case, very similar to those in the Hijo case. The claimant in the Herrera case was a Spanish national resident in the war zone, and, therefore, stamped with the status of an enemy alien. The seizure of the vessel was also a seizure made in the actual theater of military operations by United States military officers acting rightly or wrongly under their general discretionary military authority.

The Supreme Court took the same general position in the Herrera case that it took in the Hijo case; that is, that the seizure was military rather than civil; that, if the military officers of the United States acted rightly within their military authority, there was no ground of claim; if they acted wrongly, the wrong was a tort, since it involved unauthorized action by an officer of the Government, and there could be no claim within the jurisdiction of the Court of Claims, and that, in any event, the claim was disposed of under the Treaty of Peace, through the mutual reliquishment of claims by the belligerents on behalf of their respective nationals. With reference to these points, Mr. Justice McKenna, in delivering the opinion of the Court, said:

> "We have, then, these propositions established: Cuba was enemy's country, and all persons residing there pending the war, whether Spanish subjects or Americans, were to be deemed enemies of the United States, their property enemies' property, and subject to seizure, confiscation, and destruction. It would seem necessarily to follow that the claimants in this case were enemies of the United States, and their property subject to the necessities of war. And this is but the application of the rule which declares that war makes of the citizens or subjects of one belligerent enemies of the government, and of the citizens or subjects of the other."
>
> * * * * * * *

"We are then brought to consider the quality of the act of the officers of the Army who seized and used her. It would seem easy to describe. If it was done in violation of the President's proclamation, if it was done in violation of the laws of war and the conditions arising from the capitulation of Santiago, it was done in wrong, and claimants encounter the prohibitions of the Tucker act against the jurisdiction of the Court of Claims. They are in the situation of the claimant in J. Ribas y Hijo v. United States, and Juragua Iron Co. v. United States. A tort was committed against them, and though committed in the interest of the United States, there is no element of contract, and the action is one of which the Court of Claims could not take jurisdiction, whatever other redress is open to claimants."

It is clear, therefore, that in both of the above cases mentioned, cited by the Court of Claims in support of its holding that the instant case sounds in tort, the tort ground was really a secondary consideration in the decision, there being more important war and treaty questions involved. Moreover, even though the tort ground had been the principal ground of the decision, the cases cited by the Court of Claims are readily distinguishable from the instant case. While the cited cases rest upon grounds which bring them clearly within the statutory policy underlying the tort jurisdictional limitations as set forth in the Tucker Act, yet such grounds do not appear in the instant case. The instant case involves no question of unauthorized action by Government officers and no question of losses suffered by an enemy alien within the war zone. It does involve, however, a taking of the possession and title of claimant's vessel as authorized by Congress under circumstances that afford a basis for the implication of a contract.

It is submitted that the cases this Court has decided purely on the tort ground are within the underlying statutory policy of protecting the Government from liability for the unauthorized action of its officers and agents and that they, therefore, have no bearing on the instant case.

EXCERPT

From Statement of Congressman Edmonds During the Debate in the House on the Joint Resolution of May 12, 1917, Relating to the Atlas Line Steamship Company.

Congressional Record, Vol. 55, Pt. 2, p. 1923. Mr. Edmonds:

> "* * * Now I want to go into the question that was brought up this morning as to the Guarantee Trust Company of New York which has loaned to the Hamburg-American Line money for carrying on the necessary repairs, and so forth to these ships while lying in harbor. The Guarantee Trust Company, in order to be protected, undoubtedly had the Hamburg-American people turn these ships over to the Atlas Steamship Co., and the Atlas Steamship Co. endeavored to sell them when they found the war was coming on to the Karr Steamship Co. The Atlas Co. has nothing to fear. They have the right to libel any money that would come from the U. S. Government to the German owners and get their money out of it. I am not a lawyer, but I may say confidently that they will be taken care of in the settlement that will eventually be made for the ships."

A settlement being contemplated, as evidenced by Mr. Edmonds' statement, as well as by Section 2 of the Joint Resolution of May 12, 1917 (40 Stat. 75), does not the instant case sound in contract rather than in tort?

III.

The Court of Claims committed error in holding that it is without jurisdiction to hear and determine claimant's case.

It is a fundamental proposition of law that a sovereign state may not be sued in its own courts without its consent (Haycraft v. U. S., 22 Wall. 81), which consent may be granted upon such terms and conditions as the sovereign state may deem appropriate (Schillinger v. U. S., 155 U. S.

163; 15 S. Ct. 85). Prior to the year 1855, the Government of the United States withheld its consent to be sued, and up to that time a claimant against the United States had recourse only to a direct appeal to the bounty of Congress. Under the Act of February 24, 1855 (10 Stat. 612), Congress, in providing for the organization of the Court of Claims, gave qualified consent to suits being brought against the United States, in defining the jurisdiction of the newly organized Court of Claims as follows:

> "The said court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein; and also all claims which may be referred to said court by either house of Congress."

By the Act of March 3, 1863 (12 Stat. 765), the jurisdiction of the Court of Claims was enlarged by the following provision:

> "That the said Court * * * shall also have jurisdiction of all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the government against any person making claim against the government in said court."

The Act of March 3, 1887 (24 Stat. 505), known as the Tucker Act, further enlarged the jurisdiction of the Court of Claims so as to include "all claims founded upon the Constitution of the United States."

The jurisdiction of the Court of Claims to hear and determine appellant's case is covered by the jurisdiction given said Court in Section 145 of the Judicial Code, as follows:

> "All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Depart-

ment, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable."

2 U. S. Comp. St. 1916, Sec. 1136, p. 1468.

While the Court of Claims has assumed jurisdiction in few cases based solely upon the Constitution of the United States, nevertheless the Constitutional ground has been included as a constituent element in the Court of Claims assuming jurisdiction of cases raised partly on other grounds, particularly on that of an implied contract. The Court of Claims in deciding the present case upon demurrer, made reference in its Memorandum (R. 16), for its reasons, to its Opinion in the case of Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924, and in said Opinion the Court said:

> "As already stated, the taking of private property for public use by the Government, and for which the Fifth Amendment requires compensation to be made, falls within the class of claims founded upon implied contract, and the duty imposed by this amendment is an essential element in raising the necessary implication of an agreement to pay." (R. 20.)

In United States v. North American Transportation and Trading Co. (40 S. Ct. 519), Mr. Justice Brandeis said:

> "When the government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor."

From this and other cases, defining and construing the jurisdictional powers of the Court of Claims, it clearly appears that the ground on which jurisdiction of the Court of Claims is most frequently assumed is that of implied con-

tract, and it further appears that an implied contract may not be set up for jurisdictional purposes without satisfying certain elements of contractual liability or establishing the bases on which the implication of contract can rest. These bases may include either a Constitutional basis, as the Constitutional prohibition against the taking of private property for public use without just compensation, or a legislative basis, as the taking of private property under the exercise of authority provided by appropriate legislation.

In the present case, it is submitted that the facts alleged in claimant's petition present a foundation, including both the Constitutional and the legislative bases, to support an implied contract, thereby bringing claimant's case within the statutory jurisdiction of the Court of Claims.

IV.

The Court of Claims committed error in applying to its decision of appellant's case the reasons upon which it decided the case of the Deutsch-Australische Dampfschiffs-Gesellschaft, No. C-576, decided March 17, 1924 (R. 16-23).

In said Opinion, to which the Court of Claims makes reference in its Memorandum (R. 19) for reasons in deciding it is without jurisdiction to hear and determine the instant case, the Court says:

> "It was the action taken in virtue of the joint resolution that deprived plaintiff of its property, and the question is whether the circumstances gave rise to the implication of a contract of which the Court of Claims has jurisdiction. Manifestly the joint resolution was an exercise of the war power of Congress. It finds support in the constitutional provision that empowers Congress to declare war and to make rules concerning captures on land and water. Art. 1, Par. 8, cl. 11. See Stoehr v. Wallace, 255 U. S. 239; Commercial Trust Co. v. Miller, 262 U. S. 51; Brown v. United States, 8 Cranch 110, 126; Miller v. United States, 11 Wall. 268, 305; Fischer v. Palmer, 259 Fed. 355. Salamandra Ins. Co. v. New York Life Ins. Co., 254 Fed. 852.

> Several of these cases deal with the trading with the enemy act, but that act granted broad powers to the Alien Property Custodian in dealing with enemy property, and if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken by the Alien Property Custodian, in which event there would have been no jurisdiction in this court." (R. 16-23).

The "Trading with the enemy Act" (40 Stat. 411) has been held, in the cases cited which have reference to it, to be an exercise of the war power of Congress, finding support in the Constitutional provision that empowers Congress to declare war and to make rules concerning *captures* on land and water (Art. 1, sec. 8, cl. 11), but none of said cited cases construe said Joint Resolution (40 Stat. 75) to be an exercise of the war power of Congress, so supported. A "capture," in technical language, is a taking by military power (U. S. v. Athens Armory, 24 Fed. Cas. 878, 880), and it is the taking of property by one belligerent from another (In re: Whitfield, 11 Ct. Cl. 444, 456). The taking of property by the United States of a citizen or subject of the United States could not be termed "capture," in the technical use of the term, but would be a "seizure" or "taking," and it is submitted that such seizure or taking by the United States of the property of its citizen or of its subject would not be a "capture" within the meaning of the term "captures" as used in Art. 1, sec. 8, cl. 11, of the Constitution of the United States. Appellant, claimant below, is a citizen or subject of the United States, having been since June 23, 1903, a corporation created by and existing under the laws of the State of New Jersey (R. 1). The property which the United States took from claimant was vessel property, consisting of five steamships, which claimant bought from a German corporation while the United States remained a neutral in the World War. The last part of the above quotation from said Opinion reads: "if the property involved in this and similar suits had not been taken, as it was, it could admittedly have been taken

by the Alien Property Custodian, in which event there would have been no jurisdiction in this Court." Said five steamships of claimant should not be included with said property, as the Alien Property Custodian had no authority under the "Trading with the enemy Act" (40 Stat. 411) to take or seize the property of an American corporation. In the case of Behn, Meyer & Co., Ltd., v. Miller, et al. (45 S. Ct. 165, 169), Mr. Justice McReynolds, delivering the Opinion of the Court, said:

> "Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in Daimler Company, Limited, v. Continental Tyre & Rubber Company, etc., 2 A. C. (1916) 307, decided June 30, 1916.
>
> "Section 7, subsection (c), was never intended, we think, to empower the President to seize corporate property merely because of enemy stockholders' interests therein. Corporations are brought within the carefully framed definitions (section 2) of 'enemy' and 'ally of enemy' by the words: Any corporation incorporated within such territory of any nation with which the United States is at war (or any nation which is an ally of such nation) or incorporated within any country other than the United States and doing business within such territory. And we find no adequate support for the suggestion that Congress authorized the taking of property of other corporations because one or more stockholders were enemies. Logically carried out this view would have permitted the seizure of all property of companies incorporated by any associated power—*e. g.*, Great Britain—solely because some German held one share of the many thousands. The result indicates that the premise is bad. What the President might do was plainly set down in well-considered words."

From the definitions of "enemy" and "ally of enemy," given in the last quotation, special attention is called to the words: "or incorporated within any country other than the United States and doing business within such territory." It may be held that a corporation incorporated in the United States could carry on business within the territory of a nation with which the United States was at war and not be an "enemy" or "ally of enemy" as those terms are used in the "Trading with the enemy Act." Said Act made it unlawful for any person in the United States, except with the license of the President granted to such person, to trade with an enemy or ally of enemy, and any person violating the provision of the Act could be punished, under the provisions of the Act, but such person's property was not authorized to be seized by the Alien Property Custodian as *enemy* property. Corporations incorporated within the United States can under no circumstances be brought within the terms "enemy" or "ally of enemy" as used in said Act. The Court of Claims, therefore, could not properly include appellant's property when it says (R. 19-20): "In the instant case the court is asked to order compensation for *enemy* property seized by authority of a legislative act that is silent on the question of jurisdiction." Said vessel property of appellant came within the terms and provisions of said Joint Resolution of May 12, 1917 (40 Stat. 75) only in that prior to appellant taking title to said vessels on April 2, 1917, they were owned by the Hamburg-American Line, a German corporation, and had German register. If said Joint Resolution was intended as a war measure for the *capture* of enemy property, and was not intended as an authorization act for the *taking* of property under the right of eminent domain which would carry compensation to the owner, and made no adequate provision either for the return of the property to its proper owner or for the giving of just compensation to said owner if non-enemy property was taken thereunder by mistake, said Joint Resolution, when applied to non-enemy property, would be

in contravention of the Constitutional rights of the non-enemy owner not to be deprived of life, liberty, or property, without due process of law, and not to have his private property taken without just compensation, as to create an obligation on the part of the Government to compensate such owner and a Constitutional basis on which to found a claim upon implied contract within the statutory jurisdiction of the Court of Claims to hear and determine.

As appellant was not an *enemy*, being an American corporation, and its property when taken by order of the President was not *enemy* property, appellant's case is clearly distinguishable from the case of said Deutsch-Australische Dampfschiffs-Gesellschaft, and the reasons governing the decision of the Court of Claims in the latter case are irrelevant and not properly applicable to appellant's case.

Not only is appellant an American corporation, but its said vessels were already in the possession and use of the United States when the President made the orders directing the possession and title of said vessels to be taken over to the United States. Are not, therefore, the words of Mr. Justice Holmes, as used in the opinion of this Court in the case of A. W. Duckett & Co., Inc., v. U. S. (45 S. Ct. 38), applicable with peculiar force to appellant's case:

> "Whatever the effect of the taking there was a contract implied in fact by the President's order and there is no doubt concerning the jurisdiction of the Court of Claims."

Respectfully submitted,

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402-3-4 Hibbs Building,
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September 4, 1925.